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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1195

WATERFRONT GUARD ASSOCIATION, LOCAL 1852,
INDEPENDENT WATCHMEN'S ASSOCIATION OF THE
PORT OF BALTIMORE, MARYLAND,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND
AMSTAR CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

NATIONAL LABOR RELATIONS BOARD AND AMSTAR CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Waterfront Guard Association, Local 1852 (herein referred to as "Union"), respectfully prays that a Writ of Certiorari issue to review the judgment of United States Court of Appeals for the Fourth Circuit, entered in this case on December 23, 1974.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A, pp. 1a) is not yet officially reported.

The decision and order of the National Labor Relations Board (App. B, pp. 2a-18a) is reported at 209 NLRB No. 87.

The arbitration award and opinion of the Honorable Ruben Oppenheimer, a retired Judge of the Court of Appeals of Maryland, dated October 2, 1972, is reprinted in the Appendix (App. C, pp. 18a-33a).

The opinion of Chief Judge Edward S. Northrop, for the District Court of Maryland, in a companion case, not directly at issue here, upholding in principle Petitioner's action for enforcement of the Arbitration Award is reported at 363 F. Supp. 1026.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

Did the N.L.R.B. violate the holdings of this Court in *Steelworkers Trilogy, United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, by ruling that the Petitioner, Waterfront Guard Association (the Union), committed an unfair labor practice in seeking to enforce an Arbitration Award, which ruled that the Intervening Respondent, Amstar Corporation, by employing an independent contractor to provide security guards for its waterfront facilities (including piers), violated a Collective Bar-

gaining Agreement negotiated between a multi-employer bargainer, Steamship Trade Association (of which Amstar was a member), and the Union, in which Steamship Trade members were required to employ Union members exclusively to provide security required for ships, piers and adjacent areas?

STATUTES INVOLVED

The relevant provisions invoked in this dispute are 29 U.S.C. Section 159(b)(3) (Section 9(b)(3) of the National Labor Relations Act as added by the Taft-Hartley Act), and 29 U.S.C. Section 173(d), Section 203(d) of the Labor Management Relations Act.

STATEMENT OF THE CASE

This case presents a question, critical to the administration of the National Labor Relations Act, as to whether the Petitioner committed an unfair labor practice, by requesting the Intervening Respondent, Amstar, to comply with an Arbitration Award interpreting a Collective Bargaining Agreement negotiated on Amstar's behalf by Steamship Trade Association, a multi-employer bargainer. The Arbitration Award held that the Agreement required that the security guards at Amstar's waterfront refining facility in Baltimore must be members of the Petitioner Union, and that Amstar did not have the right to contract for such security services with an independent contractor.

After Amstar refused to comply with the Arbitrator's Award, the Union sought enforcement of same in the United States District Court for the District of Maryland, and that Court, denied Amstar's Motion to Dismiss and for Motion for Summary Judgment in an Opinion, 363 F. Supp. 1026, which generally upheld the validity of the Arbitration Award. Subsequent to the

Arbitration Award, Amstar instituted the within Unfair Labor Charge with the N.L.R.B. Some months later the N.L.R.B. filed its formal complaint charging the Union with the unfair labor practice. Union's Answer denied that it had committed an unfair labor practice and pleaded affirmatively the Collective Bargaining Agreement and the Arbitration Award. Testimony was taken piecemeal on July 12, July 23, and August 22, 1973, and on November 29, 1973, the Administrative Law Judge of N.L.R.B. rendered his decision, holding that the Union had committed an unfair labor practice; to which the Union excepted; After the decision was affirmed by the N.L.R.B. on March 8, 1974, Petitioner appealed to the Fourth Circuit. Without giving any real consideration to the serious issues involving the National Labor Relations Act, the Fourth Circuit affirmed the N.L.R.B. From that Order this Petition for Certiorari is taken.

Historically, prior to the enactment of the Taft-Hartley Law amending the National Labor Relations Act, security and guard employees could be members of regular bargaining units, together with ordinary employees. In most ports (including Baltimore), employees providing security for waterfront installations, were members of the International Longshoremen's Union. The Steamship Trade Association, was, and is, a multi-employer association of the waterfront facilities employers, including Amstar, in the Port of Baltimore, which among its other functions, acts as the collective bargaining agent for its members with the International Longshoremen's Association. By enactment of the Taft-Hartley Act, which added Section 9(b)(3) to the National Labor Relations Act, bargaining units of employees hired to enforce employers' rules against employees and other persons and to protect employers' property, were required to be separate from bargaining

units of other employees. Hence those employees providing security at Baltimore's (and other ports) waterfront facilities, could no longer be members of International Longshoremen's Union, and as a direct result the National Waterfront Guard Association was formed; Local 1852 being its Port of Baltimore bargaining unit. After Taft-Hartley, Steamship Trade Association continued as the multi-employer bargainer on behalf of its members, negotiating with the appropriate locals of I.L.A. as to the longshoremen, and with Local 1852 as to the waterfront guards. The guards, like the longshoremen, were not assigned to a particular waterfront employer, but historically worked in a pool for all waterfront employers who were members of Steamship Trade Association. During all these times, the Respondent, Amstar, was continuously a member of Steamship Trade Association, and on its behalf, Steamship Trade negotiated with the International Longshoremen's Union for those longshoremen employed by Amstar at its Baltimore facility. As a condition of its membership in the Association, Amstar granted Steamship Trade authority to bargain on its behalf and be bound on the contracts with all waterfront unions. It is undisputed that at no time did Amstar direct Steamship Trade not to negotiate on its behalf with Local 1852.

Prior to 1960, Amstar's guards were non-unionized, although some employees who performed both security and janitorial work were members of the Meatcutter's Union. After 1960, Amstar contracted its waterfront security, in violation of the collective bargaining agreements in question, to the Pinkerton Agency. This litigation was triggered in early 1972, after a newly elected slate of officers of the Union had determined that several members of Steamship Trade, including

Amstar, were not using Union personnel for the security services, as provided by the Collective Bargaining Agreement. Thereupon this Grievance and Arbitration proceeding was filed by the Union; only after the Arbitrator upheld the Union's contention that Amstar's waterfront security personnel were includible in the contract negotiated by Steamship Trade with the Union on behalf of its members, did Amstar initiate this proceeding with N.L.R.B.

Thus this case presents a question, critical to the administration of the National Labor Relations Act, and contrary to this Court's holdings in the *Steelworkers' Trilogy.*

REASONS FOR GRANTING THE WRIT

The failure of the N.L.R.B. and the Court below to defer to the decision of the Arbitrator was contrary to the holdings of this Court in *Steelworkers' Trilogy.*

As stated in *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. p. 581:

> ". . . the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.
>
> Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement."

This holding was reaffirmed by this Court in *Gateway Coal Company v. United Mineworkers of America* U.S. 94 S. Ct. 629 (1974), which stated:

> "The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command. Section 203(d) of the Labor Management Relations Act, 29 U.S.C. Sec. 173(d), states in part:
>
> > "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."
>
> In the Steelworkers Trilogy, this Court enunciated the now well-known presumption of arbitrability for labor disputes:
>
> > "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960)."

In *Gateway Coal,* this Court reversed the Third Circuit and held that safety disputes are no different than any other labor dispute in being subject to arbitration where the Collective Bargaining Agreement so provides, stating:

> "We think these remarks are as applicable to labor disputes touching the safety of the employees as to other varities of disagreement. Certainly industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy

> consequences of lost pay, curtailed production, and economic instability. Moreover, the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important to the one case as to the other, and the need to consider such factors as productivity and worker morale is as readily apparent."

This Court concluded therefore, that there is a "presumption of arbitrability" as earlier pronounced in *"Steelworkers Trilogy"*.

For Fourth Circuit cases upholding the validity of various arbitrations under the authority of the Steelworkers Trilogy, see, e.g. *Crigger v. Allied Chemical Corporation*, 500 F.2d 1218 (1974) and *Tobacco Workers International Union, Local 317 v. Lorillard Corporation*, 448 F.2d 949 (1971).

Even prior to the *Trilogy*, in the leading case of *Spielberg Manufacturing Co.*, 112 N.L.R.B. No. 139, decided in 1955, the N.L.R.B. also recognized the desirable objective of encouraging voluntary settlements of labor disputes by recognition of Arbitrator's Awards. The Administrative Law Judge correctly recognized that the Board will defer to the validity of an Arbitration Award, if (a) the proceedings have been regular and fai ; (b) all parties agreed to be bound; and (c) the decision of the Arbitrator is not clearly repugnant to the act.

However, the Administrative Law Judge erred in holding that the Arbitration did not meet the standards of *Steelworkers' Trilogy*.

It is beyond dispute that the Arbitration proceeding was regular and fair, the parties having chosen a distinguished retired juris as Arbitrator, who took detailed testimony, reviewed several exhibits, visited

Amstar's facility, and who wrote a thorough eighteen page decision giving his reasons why Amstar's security guards for its waterfront facility should be members of the Union.

By long historic contractual relationship with Steamship Trade Association, who had bargained on its behalf with the International Longshoremen's Association, essentially the predecessor of petitioner union, prior to the enactment of the Taft-Hartley Law, Amstar agreed to be bound by the Arbitration. During its long historical association with Steamship Trade, Amstar never attacked Steamship Trade's authority to represent it, nor during the Arbitration itself, did Amstar raise any question that the Collective Bargaining Agreement was not binding upon it. Instead, during the entire Arbitration, Amstar asserted its position on the merits. Not until the Arbitrator reached a decision unfavorable to Amstar, did it complain to N.L.R.B.

The Collective Bargaining Agreement plainly and unambiguously states that it was entered into with Local 1852, by Steamship Trade Association of Baltimore, Inc., acting for and on behalf of *"all its members"* (emphasis supplied). Identical language including all members of Steamship Trade appears in all the Collective Bargaining Agreements and renewals thereof between Steamship Trade and Petitioner. Any interpretation excluding Amstar from the plain reading of that phrase would violate the parol evidence rule.

The Arbitrator's Award was not clearly repugnant to the intention of the National Labor Relations Act, and is consistent with Section 9(b)(3) of the Taft-Hartley Law, 29 U.S.C. §159 (b)(3) which requires that employees who enforce employer's rules against other employees and outsiders, and provide plant security, cannot be members of the same bargaining unit as regular

employees. Thus the establishment of a separate unit to represent guards was given special congressional sanction; and in this instance it is historically and contractually appropriate to have a unit of guards, represented by a single union, to deal with all of those companies utilizing guards on the Baltimore waterfront. Members of the Steamship Trade Association recognized this fact and historically used the Association as their agency to bargain with Petitioner Union for all guards required for waterfront security.

In conclusion, the decision of the N.L.R.B. as affirmed by the Fourth Circuit, ignores the holdings and guidelines established by this Court in *Steelworkers' Trilogy, supra*, and *Gateway Coal v. U.M.W., supra*, and it is inconsistent with prior Fourth Circuit decisions. The Arbitration having occurred in a fair and regular way, Amstar having fully participated therein, without objection, the Union did not commit an unfair labor practice by then demanding that Amstar comply with the Arbitration Award in which Amstar had fully participated, and in seeking enforcement of the Arbitration Award by instituting action in the United States District Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, and this Court resolve this question consonant with its decisions in *Steelworkers' Trilogy* and *Gateway Coal v. U.M.W.*

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
for the Fourth Circuit

No. 74-1425

Waterfront Guard Association, Local 1852,
Independent Watchmen's Association of
the Port of Baltimore,
Petitioner,

Amstar Corporation,
Intervenor,

v.

The National Labor Relations Board
and Amstar Corporation,
Respondents.

On Petition for Review of an Order of the
National Labor Relations Board.

PER CURIAM:

We think that there was substantial evidence on the record as a whole to support the board's findings of facts, and we are persuaded that the board was not required to defer to the award of the arbiter. See Spielberg Mfg. Co., 112 NLRB 1080 (1955); Airco Industrial Gases, 195 NLRB 676 (1972).

Enforcement Granted.

APPENDIX B

United States of America
Before the Nationa Labor Relations Board

Case 5—CB—1323

Waterfront Guard Association, Local 1852,
Independent Watchmen's Association of
The Port of Baltimore
and
Amstar Corporation

DECISION AND ORDER

On November 29, 1973, Administrative Law Judge Ivar H. Peterson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed briefs supportig the Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

tions Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Waterfront Guard Association, Local 1852, Independent Watchmen's Association of the Port of Baltimore, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. March 8, 1974.

HOWARD JENKINS, JR.,
Member,
RALPH E. KENNEDY,
Member,
JOHN A. PENELLO,
Member.
NATIONAL LABOR RELATIONS BOARD

(SEAL)

DECISION

Statement of the Case

IVAR H. PETERSON, Administrative Law Judge: I heard this case in Baltimore, Maryland, on July 12, 23 and August 22, 1973, based upon the complaint issued by the Acting Regional Director for Region 5 under date of June 7, 1973, which in turn was based upon a charge filed November 27, 1972, by Amstar Corporation. Briefly stated, the complaint alleged that since about September 1, 1960. Amstar had contracted with Pinkerton, Inc., herein called Pinkerton, for guard services at Amstar's Baltimore sugar refinery. Pinkerton's employees, who performed the guard services, had at no time selected the Respondent or any other labor organization as their collective bargaining representative. Steamship Trade Association of Baltimore, Inc., herein called the

Association, is an association of employers which employ members of the Respondent Union and exists, in part, for the purpose of engaging in collective bargaining with various labor organizations, including the Respondent Union. From January 1, 1970 through December 31, 1972, the Association and the Respondent were parties to a collective-bargaining agreement covering the employees employed by members of the Association for the performance of guard work. This contract contained a valid union-security clause, providing that as a condition of employment such employees should become members of Respondent Union. The contract in effect at the time of the hearing between the Association and the Respondent covering guard work is effective from January 1, 1973 to December 31, 1975. The complaint alleged that Amstar, although a member of the Association, has at no time delegated any authority to the Association to represent it in negotiations with the Respondent Union concerning the employment conditions of guards employed by Pinkerton at Amstar's refinery. The complaint also alleged that since about October 5, 1972, the Respondent Union had demanded that Amstar recognize it as the collective bargaining representative of the guards employed by Pinkerton at Amstar's refinery and has attempted to extend the union-security clause in the association agreement to cover Pinkerton employees. In its answer, the Respondent alleged that the Association had authority to enter into a collective bargaining agreement on behalf of Amstar and did so.

On or about October 10 counsel for all parties filed briefs with me, which have been carefully considered.

Upon the entire record in the case, including my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondent

Amstar, a Delaware corporation, is engaged in the manufacture and sale of refined cane sugar and syrup at its Baltimore facility. It employs approximately 540

production and maintenance employees and 22 longshoremen, who are represented in separate bargaining units by Amalgamated Meat Cutters and Butcher Workmen of North America and International Longshoremen's Association, AFL-CIO, respectively. The record is clear that during the 12 months preceding issuance of the complaint Amstar sold and shipped products valued at in excess of $50,000 to points directly outside the State of Maryland. I find that Amstar is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I further find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Background*

In addition to its own employees, Amstar has since 1960 contracted with Pinkerton for the supply of guard services at the Baltimore facility. At the time of the hearing, there were approximately nine full-time guards and three part-time guards, all employed by Pinkerton and assigned to the Amstar refinery. Since 1960, no other guards except Pinkerton guards have been utilized by Amstar and at no time has any Pinkerton employee at that facility been represented by the Respondent or any other labor organization.

In 1922, when Amstar began its Baltimore operations, it hired its own employees to perform guard or watchmen duties as required. At that time there were approximately 10 guards and 8 janitor-watchmen. The function of the guards was to provide guard service in the general area of the front gate, while the primary function of the janitor-watchmen was to perform fire watching and janitorial duties throughout the refinery, following prescribed ADT routes. From 1922 until 1960, Amstar guards were never represented by any labor organization although Amstar did have a history of collective-bargaining relations with respect to the janitor-watchmen.

The janitor-watchmen, between 1938 and 1948, were represented by an independent local union confined to the refinery. Thereafter, the janitor-watchmen and the production and maintenance employees became members of the United Packinghouse Workers of North America. In September 1960, Amstar, in an effort to improve plant security, merged the functions of both the guards and the janitor-watchmen and subcontracted the functions performed by these two classifications to Pinkerton.

B. *The Alleged Unfair Labor Practices*

Raymond Roecker, assistant vice president and regional manager for the mid-eastern region of Pinkerton, having been employed by Pinkerton since September of 1962, was in charge of the supervision of all offices of Pinkerton in Virginia, the eastern part of West Virginia, all of Maryland, Pennsylvania, Delaware and New Jersey. Amstar has been a client of Pinkerton since October 1960 and, according to Roecker, they "have had the relationship of a contractor and a client providing security services." He testified that he personally had had no relationship with Amstar as of September 1, 1960, that Amstar and Pinkerton entered into a contract for security services which was modified by letter agreement on April 26, 1972 in respect to the rate payable to the contractor for services. This was signed by a Mr. Hawkins, the local office manager. Roecker testified that from May 1963 through the early part of 1968, when Hawkins took over as manager in Baltimore he on occasion visited with officials of clients and endeavored to see that the guards were appropriately uniformed and also to determine whether they had any grievances. He further related that Pinkerton had no relationship whatever with the Steamship Trade Association of Baltimore and was not a member of that organization, and so far as he knew, Pinkerton had given no authority to the association to negotiate contracts in its behalf. Roecker testified that, to his knowledge, the Union had never requested that Pinkerton recognize it as the collective

bargaining agent for the guards employed at Amstar. Further, he related that no guard employed by Pinkerton at Amstar or elsewhere had ever claimed to be a member of the Respondent Union. There are normally eight full-time guards and about four part-time guards. Guards are assigned directly from the Baltimore office of Pinkerton's and, according to this witness Amstar has no responsibility in this area.

Amstar became a member of the Association in 1937 and has continued its membership, apparently because it utilizes hourly labor represented by the ILA to unload vessels carrying bulk sugar to the refinery. Pinkerton is not now and never has been a member of the Association.

While the Association and the Respondent have had a bargaining relationship since approximately the mid-50s, no contract negotiated between the Respondent and the Association has ever been applied to any employee working at the Amstar facility. At no time did the Respondent, prior to February 1972, claim that any employee working at Amstar was covered by its collective-bargaining agreement with the Association. It was not until February 1972, when a new group of individuals assumed the positions of officers of the Association, that representatives of Amstar first heard of the existence of the Respondent.

The Association and the Respondent, in January 1970, entered into a 2-year agreement expiring December 31, 1972, which contained a union-security clause. On February 4, 1972, the Respondent filed a grievance with the Association alleging that Amstar employed nonunion guards in violation of the collective-bargaining agreement. The Association referred the grievance to Amstar and the representative of the latter sent a letter of response dated February 17 in which he made clear to the Association that he had never authorized the Association to negotiate on behalf of Amstar with respect to any guards employed by it and that it would be an unfair labor practice for either party to the contract, or Amstar, to extend the contract with its union-security provision to employees who were not

previously covered by the contract. On March 23, the Association's Trade Practice Committee reviewed the grievance of the Respondent, found that the Respondent was attempting to expand its area of jurisdiction, and ruled that no contract violation had occurred. Following this, the Respondent invoked arbitration to compel Amstar to apply the contract to the Pinkerton employees.

On June 20 and July 17, arbitration hearings were held before Judge Reuben Oppenheimer. Representatives of the Association and Amstar and the Respondent were present at the hearing. Pinkerton was not a party to such proceeding, nor was it provided with either formal or informal notice. At the arbitration hearing, the issue of whether or not Amstar was bound by any contract negotiated between the Association and the Respondent was not raised because of the Association's request to Amstar that it not be made part of the proceeding. In substance, the hearing concerned itself primarily with Respondent's contention that the work performed by the Pinkerton guards at Amstar's facility came within the express jurisdictional provisions of the contract. Amstar and the Association contended that the work performed by the Pinkerton guards was not covered by the jurisdictional paragraphs of the contract; that past practice governed; and that the Respondent, by its past conduct, had recognized that it did not have jurisdiction. Under date of October 22, the arbitrator handed down his award in which he concluded that Amstar was in violation of the agreement.

Pursuant to a request for interpretation of the award by Amstar on October 17, the arbitrator in a letter dated November 20, confirmed his ruling which "requires that all nine guards employed at Amstar's Baltimore facility must become and remain members of the Waterfront Guard Association."

Throughout October and November 1972, and continuing to the present, the Respondent has made efforts to enforce the arbitrator's award. On or about October 5, Mr. Fortune, managing director of the Association, telephoned Henry Kief, a representative of Amstar, and informed him that the Respondent wanted Amstar to commence hiring members of the Respondent. Following that, by letter dated October 13, Attorney Davis on behalf of Respondents, made a further demand that the guard work at the Amstar facility be performed by Respondent's members. The newly elected financial secretary of the Respondent, Thomas, informed Kief that if Amstar did not begin hiring members of the Respondent immediately that the Respondent would seek retroactive pay from October 2, the date of the arbitration award. Thomas called a second time on November 16, and in this conversation requested a meeting with Kief so that they could discuss the hiring of members of the Respondent. Thomas further indicated to Kief that Amstar could keep the guards it then had but that the guards would be required to join the Union. A third call by Thomas to Kief was made on November 17, in which Thomas told Kief that the arbitrator had not changed his mind and Thomas again insisted that Amstar hire members of the Respondent. Finally, on November 20, Thomas called Kief the fourth time and again inquired as to when Amstar was going to do something with respect to hiring members of the Respondent and mentioned that the retroactive pay was approximately $10,000. Upon Amstar's refusal to comply with the arbitration award, the Respondent brought suit in Federal Court to enforce the award. This was pending at the time of the hearing herein.

The record is clear that Thomas never claimed to represent any of the Pinkerton guards. Thus, he testified as follows:

> Q. (by Mr. Balsamo) Do you claim to represent any of the Pinkerton guards? A. No.

Q. What guards other than the Pinkerton guards are employed at the Amstar facility that you claim to represent? A. There are none others right now except Pinkerton so I don't plan to represent any of them there now . . .

Q. (by Mr. Balsamo) Let's reiterate one more time, you state that you don't claim to represent the Pinkerton guards at Amstar? A. That is correct.

Q. Now, or back in 1972 either? A. At any time.

Discussion and Conclusions

Happily, there is little or no disagreement on the facts with respect to the violations alleged in the complaint. Moreover, it is apparent that from February 4, 1972, until the present time, the Respondent has attempted to apply the union security provisions of its collective bargaining agreement with the Association to the employees of an employer who have never selected the Respondent as a collective-bargaining representative. Indeed, Financial Secretary Thomas conceded that the Respondent does not represent any of the guards employed at the Amstar facility; moreover, he conceded that he informed Amstar that the guards would have to become members of the Union. Finally, he buttressed this demand by informing Mr. Kief that if Amstar did not comply, the Respondent would seek retroactive pay from October 2. Counsel for the General Counsel, accordingly, argues that from the time "Respondent filed its grievance on February 4, 1972, Respondent has set upon a course designed to coerce Amstar into interfering with the labor relations of another employer, Pinkerton, and Section 7 rights of the Pinkerton guards. This case represents 8(b)(2) and 8(b)(1)(A) violations in their most flagrant form." Counsel for the General Counsel submits that there are three separate bases, any one of which, standing alone, is sufficient to establish that the Respondent violated the Act. In the first place, he points out that the Pinkerton guards are not part of any multi-employer bargaining unit. Accordingly, he argues that the Respondent, in dem-

anding that the Pinkerton employees be covered by the Association-Union contract, the Respondent is in effect demanding that Pinkerton's employees become union members as a condition of employment in violation of the foregoing sections of the Act. In the second place, counsel for the General Counsel points to the fact that Amstar had never manifested an unequivocal intent to be bound in collective-bargaining negotiations between the Association and the Respondent. Finally, he argues that neither the Association, nor the Respondent, nor Amstar for that matter, "has any legal right to include Pinkerton employees as part of a multi-employer contract unit in the event it is found that Amstar is bound by the Association's contract with Respondent. The Board has held that an employer violates Section 8(a)(2) and the Union 8(b)(2) and 8(b)(1)(A) of the Act when they include employees as part of the multi-employer bargaining unit without the employees' consent. The evidence is abundantly clear that the Pinkerton employees have never been afforded an opportunity to choose or reject a particular union in any form of bargaining unit. To impose a union-security clause on such employees even under color of an arbitration award is totally inconsistent with the rights guaranteed to employees under the Act."[1]

Counsel for the General Counsel contends that, in effect, the arbitrator's award is analogous to a unit clarification proceeding before the Board but, that in such proceedings the Board has established the principle that when the parties to a contract have for long periods of time excluded certain employees from contract coverage, it raises a question of representation that can best be resolved by an election, rather than by a petition to clarify unit. He asserts that the arbitrator has in effect made a unit clarification decision by including the guards at the Amstar facility, despite the fact that the Association and Respondent have excluded these employees for almost 20 years. In sub-

[1] Footnotes omitted.

stance, counsel asserts that "Respondent's insistent demands that Amstar comply with the arbitrator's award can only be honored by Amstar if it violates Section 8(a)(2) of the Act."

Counsel for the General Counsel, in his brief, states that in the defense raised by the Respondent it contends "that its actions are justifiable because it is only demanding compliance with an arbitral award," and that it "asserts that it has never requested that the Pinkerton guards become part of the bargaining unit; its only contention being that under the contract Amstar had no right to subcontract the work to Pinkerton." Counsel for the General Counsel labels the first defense as "weak and specious," because in order to sustain that position "it must be shown that the arbitrator's award is valid and not in irreconcilable conflict with the Act." It is his position that the "arbitrator's award is repugnant to the purposes and policies of the Act," and in support thereof points out that "a necessary party, Pinkerton was not a party to the proceeding" and was not provided with either official or unofficial notice of the proceeding. He properly points out that Pinkerton had a direct and vital interest in that proceeding, inasmuch as the Respondent was attempting to apply its contract to the employees of Pinkerton, an employer who had never entered into that contract. In support of his position, Counsel for the General Counsel cites *White Front San Francisco, Inc.*, 203 NLRB No. 79, where the Board held that it would not defer to an arbitrator's award because the party affected by the award was not a party to the proceeding and that, therefore, the arbitration did not meet the standards set forth in *Spielberg*, 112 NLRB 1080. In addition, he points out that crucial issues were not even considered by the arbitrator, i.e., he never considered the question of whether or not Amstar had ever manifested an unequivocal intent to be bound by the agreement the arbitrator was interpreting, or whether or not Amstar and Pinkerton could properly be considered joint employers under the Act. Finally, counsel for the General Counsel contends that the

arbitrator's award is contrary to established Board and Court decisions citing *Radio Television Technical School, Inc.*, 199 NLRB No. 85, and *Combustion Engineering, Inc.*, 195 NLRB No. 161, where the Board refused to defer to an arbitrator's conclusion "that the employees of a facility newly established by the employer had been accreted to the existed bargaining unit and thus covered by the bargaining agreement."

With regard to the Respondent's second defense, namely, that it was only objecting to Amstar's subcontracting the guard work to the Pinkerton agency, counsel for the General Counsel suggests that the letter from the Respondent's attorney to the Association and Amstar "clearly establishes that Respondent was demanding full compliance with the arbitral award. Moreover, Mr. Kief and Mr. Thomas both testified that the Respondent was demanding that the guards at the Amstar facility should become members of the Union in compliance with the award of the arbitrator, a demand which if complied with would result in the inclusion of the Pinkerton employees in the multi-employer bargaining unit.

Concerning the contention that Amstar did not have the right to subcontract the work, the evidence clearly establishes that since the Respondent and the Association began their bargaining relationship sometime in the mid-1950s until February 10, the Union never claimed the right to represent the employees who performed the guard work at the Amstar facility.[2]

Counsel for the Respondent argues that the Board should defer to the arbitrator's award, approved by the

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[2] Counsel for Amstar points out that Mr. Fortune, managing director of the Association, testified that up until the instant arbitration award, it was the position of the Association that its contract with Respondent did not cover the guard work performed at Amstar's Baltimore refinery, a fact which is consistent with the further fact that Amstar was never asked to post the $500 bond which is required of all Association members covered by the labor agreement with the Respondent.

Court and, accordingly, dismiss the complaint. He asserts that this case is squarely within the Board's analysis in *Spielberg*, and that in order to defer to the award it is not necessary to apply *Collyer Insulated Wire*, 192 NLRB No. 150.

In *Spielberg*, the Board enunciated certain test that must be met before it will recognize the validity of an arbitration award. These are: (a) the proceedings must have been fair and regular; (b) all parties must have agreed to be bound; and (c) the decision of the arbitrator must not be clearly repugnant to the Act.

In the present proceeding, Pinkerton, although a necessary party, was not in fact a party to the proceeding and was not provided with either official or unofficial notice of the proceeding. It seems plain that Pinkerton had a direct and vital interest in that proceeding because what the Respondent was attempting to do was to apply its contract to Pinkerton's employees, an employer who had never entered into the contract. Plainly, the arbitrator's award directly affects the Pinkerton employees because it requires the nine guards to become and remain members of the Union. Moreover, the arbitrator never considered the question of whether or not Amstar had ever manifested an unequivocal intent to be bound by the agreement that he was interpreting or whether Amstar and Pinkerton could be considered joint employers under the Act. Finally, in my view the arbitrator's award is contrary to established Board and Court decisions, as pointed out by counsel for the General Counsel in his brief.

I conclude, substantially for the reasons set forth by counsel for the General Counsel in his brief, that in the present case it would be inappropriate to defer to the arbitrator's award because that award is repugnant to the policies and the purposes of the Act.[3]

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[3] See also *Bigge Drayage Company*, 197 NLRB No. 34, where the Board affirmed the following findings of the trial Examiner:

> Respondent, conceding the jurisdiction of the Board, under Section 10(a), asserts the policy of promoting

Accordingly, for the foregoing reasons, I find that Amstar was not bound by the contract between the Association and the Respondent Union with respect to the representation of the Pinkerton guards. Moreover, it is plain that Pinkerton, not a party to the argument, and which had not delegated to Amstar any right to speak for its guard employees in matters of labor relations and collective bargaining was not bound. I find that Respondent's attempts to cause Amstar to comply with the award of the arbitrator constitutes a violation of Section 8(b)(1)(A) and 8(b)(2) of the Act. Accordingly, I shall issue an appropriate recommended Order.

Conclusions of Law

1. Amstar Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Steamship Trader Association of Baltimore, Inc., is an association of employers which employ members of the Respondent, which exists, in part, for the purposes of engaging in collective bargaining in behalf of its members with various labor organizations, including the Respondent.

3. Amstar, although a member of the Association, has at no time material herein delegated any authority to the Association to represent it in negotiations with the Respondent with respect to the wages, hours and conditions of employment of employees employed by

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industrial peace and instability through collective bargaining obliges the Trial Examiner to defer to the grievance-arbitration procedures which the parties have voluntarily established. I do not agree.

In *Collyer* the Board found the dispute, in an alleged failure to bargain case involving unilateral changes in an existing contract between the parties, was essentially a dispute over the terms and meaning of the contract.

I find *Collyer* inapposite. *Bigge*, the charging party herein, has never been a party to the contract in question. I find no merit in this contention.

Pinkerton to perform guard services at the Respondent's facility in Baltimore.

4. Waterfront Guard Association is a labor organization within the meaning of Section 2(5) of the Act.

5. By demanding that Amstar recognize the Respondent as the collective bargaining representative of the guards employed by Pinkerton to perform the guard services at Amstar's refinery, although said employees have at no time selected Respondent as a collective bargaining representative, the Respondent has engaged in, and is engaging in, unfair labor practices as defined in Section 8(b)(2) and 8(b)(1)(A) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I issue the following recommended:[4]

ORDER

Waterfront Guard Association, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Demanding that Pinkerton, Amstar, or the Association enter into a collective bargaining agreement covering the guard employees of Pinkerton at the Amstar facility unless and until such employees have selected the Respondent as their collective bargaining representative in a Board-conducted election or by other valid means.

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[4] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its respective business offices and meeting halls, if any, within the geographical area where Pinkerton operates, i.e., Virginia, the eastern part of West Virginia, and the states of Maryland, Pennsylvania, Delaware and New Jersey, copies of the attached notice marked "Appendix."[5] Copies of said notice, to be furnished by the Regional Director for the Fifth Region, shall, after being duly signed by a representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Sign and mail to the Regional Director for the Fifth Region, sufficient copies of said notice for posting by Pinkerton, Amstar and the Association where notices to employees, and members of the Association, are customarily posted, if any of said parties are willing to do so.

(c) Notify the Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.

IT IS FURTHER recommended that unless, on or before 20 days from the date of the receipt of this Decision, the Respondent shall notify the said Regional Director that it will comply with the foregoing Recommended Order,

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[5] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the National Labor Relations Board issues an order requiring that Respondent take the aforesaid action.

Dated at Washington, D. C.

IVAR H. PETERSON,
Administrative Law Judge.

APPENDIX C

Case 3-72

Amstar Corporation

Steamship Trade Association of Baltimore, Inc.

v.

Waterfront guard Association of the Port of Baltimore Local No. 1852 Independent Watchmen's Association

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THE ISSUE

The issue is whether Amstar Corporation (Amstar) is employing security guards and/or watchmen who are not members of the Waterfront Guard Association Local 1852 I.W.A. (the Union) in violation of the collective bargaining agreement in effect between the parties (the agreement).

THE FACTS

During the two days of hearings, testimony was taken and a number of exhibits were filed. The arbitrator, by agreement of the parties, made a personal inspection of the Amstar facility and additional

information was elicited in the presence of counsel for the parties.

The current agreement dated January 1, 1970 was entered into between the Steamship Trade Association of Baltimore, Inc. (the S.T.A.), acting on behalf of all its members, and the Union. Amstar has been a member of the S.T.A. for over 25 years.

Amstar's Baltimore facility is located in the Inner Harbor of the Port of Baltimore. It is a private facility, over 20 acres in size. Only Amstar's material and products are handled and processed therein.

Vessels carrying raw sugar are docked alongside a pier. The raw sugar arrives at the refinery on ocean-going vessels not owned by Amstar and is unloaded on an average of three days a week. On the pier are two 12-ton cranes which take the raw sugar from the ship and place it on a conveyor belt which takes the sugar to a weigh scale. At this scale a representative of the company selling the sugar, a representative of Amstar and a United States custom inspector weigh the sugar. The raw sugar is consigned to Amstar but Amstar only purchases it after it has been weighed.

After the sugar had been weighed it goes on another conveyor belt which takes it either into the old raw sugar warehouse, the new raw sugar shed or directly into the manufacturing process. Sugar which is placed immediately into the manufacturing process can be completely refined and packaged within a 24 hour period. The refinery produces approximately five million pounds of refined cane sugar a day. The refined cane sugar and cane syrup which Amstar manufactures are sold to industrial users and grocery chains throughout the country and to the federal government.

The refined cane sugar and syrup are shipped from the refinery for the most part by truck and rail cars but on occasion barges are also used to ship the manufactured products. The barges use a slip on the facility which, like the area used by the ships bringing the raw sugar, is a pier property. Barges enter the slip about twice a month carrying empty containers for use in the

packaging of the refined sugar, and, after unloading, the barges take out refined sugar. When the refined sugar is to be shipped by barge it is put on a fork lift truck in the building used to manufacture Domino sugar and is taken to the barge by the truck.

Amstar employs 22 members of the International Longshoremen's Association (the I.L.A.) to assist in the unloading process. All of the I.L.A. members, except one timekeeper, work on the ship. About 500 men work in the production and maintenance of the refined sugar; these employees are represented by the Amalgamated Meat Cutters & Butchers Association of North America (the Meatcutters Union). Members of the Meatcutters Union operate the two cranes on the pier used for unloading the raw sugar.

There are three large parking lots on the company's facility, one of which is across Key Highway. The pier properties and manufacturing facilities of Amstar are on the other side of that highway. This lot is used as an overflow during the afternoon shift and is not easily seen from the gate house. The parking lots are unpaved and are not well lit. Amstar's employees use these lots for the parking of their automobiles.

No guard or security work is required on the pier areas and Amstar employs no one to guard these areas. Nor does Amstar require or use guards for the cargo on the ships. If the owner of the vessel or the vessel's agent finds it necessary or desirable to employ guards for the security of his ship or the cargo, guards are employed who are members of the Union. The warehouses where the raw sugar is deposited are unguarded; because of its bulk and unfinished condition, the raw sugar is not subject to theft. However, Amstar has employed guards at its facility for other duties from 1922 to the present time.

Until 1960 Amstar used its own employees, some represented by the Meatcutters Union, to perform the guard or watchman duties which it required. In 1960 Amstar entered into a contract to perform this work with a private agency, Pinkerton's, Inc. (Pinkerton)

which has furnished guard and watchman service for Amstar from that time to the present. Pinkerton performs this work under rules and regulations promulgated by Amstar. There are nine employees working on three shifts who perform these duties. None of Pinkerton's employees are members of the Union or any other union.

The three shifts are day, afternoon and night. Three Pinkerton men work on each shift. On the morning shift (8:00 A.M.-4:00 P.M.) the guards are stationed at the gate house to the entrance to the facility. One guard on this shift spends approximately twenty per cent of his time supervising the punching of time clocks by the hourly employees. Another guard will be in the gate house monitoring the refinery's communications system. The primary function of the day shift guards relates to traffic control. Trucks coming into the facility to pick up refined sugar go past the gate house and stop at the weighing station where the truck is weighed. After being weighed the truck proceeds to the refined sugar warehouse where it is loaded and given a pass. After the truck has been loaded and reweighed the driver receives a scale ticket which is given to the guard at the gate house. Guards on the day shift also direct people coming into the facility and patrol the parking lots.

The three guards employed on the afternoon shift (4:00 P.M.-12:00 P.M.) perform essentially the same duties as the morning shift guards, with the added responsibility of administering first aid when necessary. One of the guards on this shift puts on the lights in the cooperage building and the cafeteria.

On the night shift (12:00 A.M.-8:00 A.M.) one of the three guards remains in the gate house to administer the internal communications system. The other two guards alternate each hour in making A.D.T. tours. There are 44 A.D.T. boxes at various places in the refinery and it takes a guard approximately 50 minutes to punch the 44 boxes. There are no A.D.T. stations on the piers. While one of the guards is making his A.D.T. round, one guard is in the gate house and the other

guard is in the area of the parking lots. The guards rotate.

At no time do any of the nine guards or watchmen guard or watch the pier areas where sugar is being unloaded from the ships, the area where raw sugar is being stored, or the movement of cargo to and from ships, trucks or barges.

All of the guards take some part in the patrolling of the parking lots. If a guard sees someone whom they know is not authorized to use the lot, the guard will question him and, if he deems it advisable, report his presence to the Assistant Personnel Manager. It is part of the duty of a guard patrolling any parking lot to prevent unauthorized persons from entering the premises. The guard performing these duties will check anyone they see tampering with an automobile as a measure of protecting the property. The guards are not armed. When they find cars illegally parked they write tickets and notify the Assistant Personnel Manager. During the night shift a guard spends approximately four hours assisting the guard stationed at the gate house and checking the property or cars in the parking areas.

The second, third, fourth and fifth paragraphs of the agreement read as follows:

> "It is the intent and purpose of the Association and the Union that this agreement will promote and insure the security of the Port of Baltimore and Vicinity and harmonious labor relations between the parties, and that any security work, performed for employers in connection with the piers, immediate pier areas, or cargo on ships or security work in connection with passengers in the Port of Baltimore and Vicinity shall be done exclusively by members of the Union.
>
> "The employers recognize the Waterfront Guard Association, Local 1852-Independent Watchmen's Association, as the exclusive collective bargaining agent for all its employees employed as watchmen and/or guards in respect to wages, hours and other

terms and conditions of employment in the Port of Baltimore and Vicinity.

"Work required to be done by employers to watch and guard pier properties, cargo thereon, movement of cargo to and from ships, lighters and trucks, and also, cargo on ships which is covered by this agreement as further described in Article 8, including passenger operations and all work presently performed by members of the Union shall be performed by watchmen and/or guards covered by this agreement. Except when it has been a regular practice to use ship's personnel, watchmen shall not be replaced by ship's personnel.

"Such work shall also cover, when watched, the watching and guarding of stowaways, detainees and gangways, medical holds and payrolls unless the ship's master exercises his option of performing such work with ship's personnel."

There were the same paragraphs in the collective bargaining agreement between the parties in effect from January 1, 1966 to December 31, 1969. In the agreement between the parties effective from January 1, 1963 to December 21, 1965, and in the preceding agreements, the jurisdictional statement was contained in one paragraph which read as follows:

"1. It shall be the duty of the employees to watch gangways, pier properties, cargo thereon, movements of cargo to and from ships, lighters and trucks, cargo on ships, except where it has been the regular practice to use ship's personnel, or property and cargo on piers, except where it has been the practice to use railroad police. Stowaways, detainees, medical holds, employment of payroll guards, may be guarded, in the discretion of the Employers or Customers of the employers, either by ship's personnel, or office personnel of Steamship Companies or Agents, or by the Employees, under the provisions of the above preamble. The transportation of stowaways, medical holds, or detainees from one port to another port, also to be at the

discretion of the Employers or Customers of the Employers, Steamship Companies or Agents, or office personnel of Steamship Agents, or by a member of the Union."

During the negotiations which preceded the execution of the agreement dated January 1, 1966 to December 31, 1969, the Union submitted a proposal for changes from the preceding agreement. One of these proposed changes was that the jurisdictional language should be altered so as to make the Union the exclusive collective bargaining agent for all its employees employed as watchmen and/or guards and gatemen. Neither the agreement effective January 1, 1966 nor the subsequent agreements referred to gatemen.

None of the guard or watchman work performed by the Pinkerton employees was ever performed by employees who are members of the Union. This is the first grievance filed by the Union which has claimed that these employees should be members of it.

Shortly before the filing of the grievance here involved, there was a change in the officers elected by the Union to represent it. The new officers went to New York to confer with officials of their international union and its counsel. Thereafter, this grievance and other grievances heard by this arbitrator at the same time were filed.

DISCUSSION

The Union contends that the work done by the Pinkerton employees comes within the express jurisdictional provisions of the agreement and that, in any event, the third paragraph of the agreement governs. This paragraph recognizes the Union as the exclusive agent for all of the employees of the company employed as watchmen and/or guards. The Union contends that this recognition is without exclusion and is applicable to any security work of any kind done for Amstar, no matter where performed.

Amstar contends that the jurisdictional paragraphs of the agreement do not give the Union jurisdiction over the men now employed as Pinkerton guards; that if the agreement is ambiguous, past practice governs and shows that the Union, by its conduct, has recognized that it does not have the jurisdiction it now claims; and that, in any event, the Union has waived its claim.

In the construction of the agreement there are, in my opinion, three core questions. The first question is whether, as the Union contends, the third paragraph gives the Union jurisdiction over all employees doing any kind of security work, no matter where performed. If this question is answered in the negative, the second question is whether the agreement gives jurisdiction to the Union over men who perform any security work in connection with the piers or pier areas, even though that work is not done by them in the actual pier areas. If the answer to the second question is in the affirmative, the third question is whether the men now employed by Pinkerton perform any security duties in connection with the pier areas, even though they do not work on the piers themselves.

I have considered the first issue, which deals with the construction of the third paragraph of the agreement, in an arbitration case involving the S.T.A. and the Union, *Case No. 4 — 72 — The General Ship Repair Corp.*, the opinion and decision in which are being filed today. In that case, for the reasons therein set forth, I held that the word "all", as used in the third paragraph of the agreement, was not meant to include any security work of any kind, no matter where performed. In the opinion in that case, which is incorporated herein by reference, I pointed out that if "all" as used in that paragraph was intended to be so construed, the other jurisdictional paragraphs would have been unnecessary and that to give the third paragraph the sweeping, unrestricted meaning for which the Union contends would be contrary to the intent of the parties as expressed in the other jurisdictional paragraphs of the agreement. For the reasons set forth in the *General Ship Repair Corp.*, opinion, I disagree with the Union's contention as to the construction of the third paragraph.

The determination of the second question, in my judgment, depends upon the meaning of the second paragraph of the agreement, which provides that it is the intent and purpose of the parties that any security work performed for employers in connection with the piers, an immediate pier areas, shall be done exclusively by members of the Union.

It is significant, I think, that this language did not appear in the collective bargaining agreements between the parties prior to the agreement which became effective January 1, 1966. In the prior agreements, the jurisdiction of the Union set forth was limited to the itemized duties of watching gangways, pier properties, cargo thereon and movements of cargo to and from ships, and the watching and guarding of stowaways and detainees. (The jurisdictional language as to stowaways, detainees and medical holds, both in the prior agreements and the current agreement, is not pertinent to the issue here involved). The jurisdictional language in the agreement in effect from January 1, 1963 to December 31, 1965 was transferred to the fourth paragraph of the agreement effective January 1, 1966 where it remains in the current agreement. In the agreement effective January 1, 1966 and in the current agreement, the second paragraph was added to the specific jurisdictional statement set forth in the fourth paragraph.

The effect of the additional language, in my judgment, was clearly to enlarge the Union's jurisdiction. This enlargement was the requirement that any security work in connection with the piers and immediate pier areas was to be performed exclusively by members of the Union.

It is the general rule in the construction of a contract that it should be interpreted in a manner which gives meaning to all its provisions; it is not to be assumed that the parties have written into their agreement unnecessary and surplus provisions.

It is evident, in my judgment, that by including the additional language of the second paragraph the

parties meant the phrase "any security work in connection with piers" to be applicable beyond the particular categories of jurisdiction set forth in the fourth and fifth paragraphs. The additional language does not purport to be merely a restatement of the categories of work over which the Union has exclusive jurisdiction as set forth in the paragraphs which follow. The watching and guarding of pier properties and cargo may be regarded as examples of "any security work, performed for employers in connection with the piers", but to limit that provision to the examples would be, in effect to render it superfluous and to disregard the broader concept which it embodies.

Unlike the situation as to the construction of the phrase "all employees" in the third paragraph of the agreement, to give full effect to the phrase "any security work in connection with the piers [and] immediate pier areas" as used in the second paragraph would not render the other jurisdictional provisions of the agreement unnecessary. The fourth and fifth paragraphs of the current agreement, which embody all of the jurisdictional statement of the former agreements, set forth various kinds of work which are covered. These paragraphs make clear that certain kinds of work, such as watching and guarding cargos on ships and the movement of cargo to and from ships are covered, even though some question might be raised as to whether these activities come within the general phraseology of the second paragraph.

The phraseology of the second paragraph does not purport to cover any security work for employers no matter where performed, but is limited to such work in connection with the piers and immediate pier areas. It is to be construed, in my opinion, as applicable to work done somewhere on the employer's facility, whether or not on the piers, if in connection with them.

The next question is whether any of the work performed by the Pinkerton employees is security work in connection with the piers or immediate pier areas. It is undisputed that the Baltimore facility of Amstar includes piers and pier areas used for the unloading of

the ships containing raw sugar and for the unloading and loading of the barges. The situation, therefore, is different than that presented in the *General Ship Repair Corp,* case, in which I found that the property of that company was exclusively a ship repair facility. In that case there was no pier or pier area.

In this case the piers and pier area constitute a relatively small part of Amstar's facility. Most of that facility is a manufacturing plant and not a maritime property. The various operations carried on constitute a complex of integrated activities. However, it is clear that the piers and pier properties, however minor in comparative area, constitute a vital part of the facility.

It is also clear that no guard or security work is done by any Pinkerton employee on the piers or pier areas. But if any security work is done in connection with those areas somewhere on Amstar's facility, even if not upon the piers themselves, then, under what I think is the clear construction of the agreement, the Union's claim is to be sustained.

Each one of the nine Pinkerton employees, at some time during the shift in which he serves, irrespective of the shift, does some work in patrolling the three parking lots. This guard work in connection with the parking lots constitutes a comparatively minor proportion of the time of any of the guards during his period of duty. Nevertheless, it is an important part of that duty.

The lots are used by the employees of Amstar for the parking of their personal automobiles, no matter on what part of Amstar's facility they are employed, including the employees who work in the unloading of the ships at the pier and the loading and unloading of the barges. These employees constitute a small part of the total labor force but the work they do is an integral part of Amstar's operations and it is work done on the piers or pier areas. These employees need their cars to reach Amstar's property; they leave them in the parking lots when they go to the piers and return to the lots after their work is done.

The Pinkerton guards patrol the parking areas and endeavor to exclude persons who are not authorized to use them; they promptly report any unauthorized persons and any tampering with the cars. The lots are unpaved and not well lit. The security work which the Pinkerton employees do in patrolling the parking lots is not work in the guarding of the piers or pier areas but it is work in connection with the guarding of the property and, to some extent, the persons of the men who work in those areas.

The guarding of the property of men performing maritime duties on a pier is as much security work as the guarding of the pier itself. It is work in connection with the piers, for it relates directly to the men who are working on the pier; in protecting their property while they are performing their maritime duties, it facilitates the performance of their duties. If the parking lots were on the pier, the relationship would be self-evident. The fact that the parking lots are not adjacent to the pier and slip seems to me unimportant, for the lots are on Amstar's facility.

I find that the guarding of the parking lots, even though those lots are not part of the pier properties, is security work in connection with the piers and immediate pier areas and, therefore, should be performed by members of the Union.

It is immaterial that the security work done by the Pinkerton employees which brings them within the coverage of the agreement may be a relatively small proportion of the time they spend in the performance of their duties. The agreement states unequivocally that any security work in connection with the piers and pier areas shall be done exclusively by members of the Union. The use of the word "any" seems to me deliberate and significant.

In view of this holding, I do not reach the issue of whether or not the work of the Pinkerton employees as gatemen would of itself bring them within the purview of the agreement or the effect, if any, on this question of the negotiations leading to the 1966 agreement when

the Union unsuccessfully requested that gatemen be specifically covered.

Nor do I reach the question of the effect of the alleged past practice of the Union in not contesting the right of Amstar to have the guard work involved performed by employees who are not members of the Union. It is only when the terms of a collective bargaining agreement are ambiguous that past practice may be considered as a useful aid in resolving the dispute. In this case I find that the agreement is clear and unambiguous.

I find also that the Union has not waived its right to claim jurisdiction in this proceeding. Waiver is an intentional or voluntary relinquishment of a known right. It involves both knowledge and intent.

It is true that at no time since the collective bargaining agreement between the S.T.A. and the Union which became effective October 1, 1950, to the filing of the grievance here considered, did the Union claim the right to represent the men who performed the guard work now being done by the Pinkerton employees. Even after the change in the jurisdictional provisions in the agreement effective January 1, 1966, the Union made no such claim until the present time. It does not follow, however, that the Union knowingly and intentionally relinquished its right.

The testimony is that the Union only realized that it might have jurisdiction over the guards, under the agreement, after its newly elected officers consulted with officers and counsel of its International in New York, shortly before the filing of the present grievance. Of course, a change in officers would not affect a waiver by the former officers, if there was one, but it does not appear that the question was ever before considered. Even if the Union were to be charged with knowledge of the proper interpretation of the agreement, however, there is no evidence that the Union knowingly and intentionally gave up its right.

Failure to claim a right under a collective bargaining agreement in the past does not of itself preclude the

subsequent assertion of that right. In another arbitration proceeding, I pointed out that, in labor matters, it is sometimes the part of wisdom for both the employer and the union to leave certain issues unresolved, for future discussion and resolution. The reach of a document, whether it is a collective bargaining agreement or the Constitution of the United States, is not determined by the absence of past efforts to delineate it.

In its argument on the question of waiver, Amstar has cited several opinions of other arbitrators and of the National Labor Relations Board. In arbitration proceedings, other opinions may be helpful, but they are not controlling. In any case, in my judgment, the decisions to which Amstar refers are distinguishable on their facts.

In *Milford Co.*, 46 L.A. 841 (1966), the issue before the arbitrator was whether the position of associate credit manager belonged in the union's bargaining unit. The first man promoted to that position, several years before, had dropped his membership in the union without protest from it. When the company discontinued pension fund payments on behalf of the second man appointed to the position, the union again made no protest. The arbitrator held that the union's failure to act on these occasions amounted to a waiver of the employer's unilateral action. In that case, the issue had been twice crystallized, and the union's failure to protest in either case might well be interpreted as a knowing and intentional relinquishment of its right. In the present case, at least since the change in the agreement's jurisdictional language in 1966, the issue had never been concretely raised by any affirmative action of Amstar.

In *Amerace Esna Corp.*, 58 L.A. 869 (1972), in which the arbitrator held there had been a waiver, he found that the union had affirmatively agreed to the action about which it later complained. *Tri-State Transportation Co.*, 179 NLRB 310 (1969) involved the establishment of proper units in a representation election. The Board held that the intervening union had waived its

right to represent certain employees because any effort to apply its contract to them only occurred after the petitioning union sought to represent them, and that the employees were not in fact represented when the petition was filed. I do not find this decision, or the other Board election decisions referred to, apposite.

In the present case, there had been no affirmative action by Amstar or by any other union which called upon the Union to make its position as to jurisdiction evident. At most, it failed to take affirmative action itself. On the facts, in my opinion, this did not constitute the intentional, voluntary relinquishment of a right essential to a waiver.

Nor is the Union estopped to make its claim. There is no evidence that Amstar changed its position to its prejudice or resultant injury in reliance upon the Union's previous inaction in respect of the assertion of its jurisdictional claim.

That claim is not in any respect retroactive in nature. The Union asks only that, from the date of this decision, the security work involved shall be done exclusively by members of the Union. For the reasons set forth, I find that the claim is justified.

DECISION

The grievance of the Union is sustained.

REUBEN OPPENHEIMER,
Arbitrator.

October 2, 1972.

Reuben Oppenheimer
400 The Quadrangle
Village of Cross Keys
Baltimore, Maryland 21210

November 20, 1972

Andrew M. Kramer, Esq.,
Seyfarth, Shaw, Fairweather & Geraldson
111 West Jackson Boulevard
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Wilford L. Davis, Esq.,
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New York, N.Y. 10007

Re: Steamship Trade Association of Baltimore, Inc. and Waterfront Guard Association of the Port of Baltimore Local No. 1852 Independent Watchmen's Association — Amstar Corp. Case 3-72.

Gentlemen:

This letter will confirm my oral ruling at the conclusion of the conference held on November 16, pursuant to Mr. Kramer's letter of October 17 in respect of the interpretation of my decision, as Arbitrator, dated October 2, 1972.

The decision requires that all nine guards employed at Amstar's Baltimore facility must become and remain members of the Waterfront Guard Association. The decision is effective from its date.

Very truly yours,

REUBEN OPPENHEIMER,
Arbitrator.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1196

WATERFRONT GUARD ASSOCIATION, Local 1272, Independent Watchmen's Association of The Port of Baltimore, Maryland,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

AMSTAR CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1195

WATERFRONT GUARD ASSOCIATION, Local 1852, Independent Watchmen's Association of The Port of Baltimore, Maryland,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

AMSTAR CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, Amstar Corporation (hereinafter referred to as "Amstar") opposes the Petition for a Writ of Certiorari filed by the Waterfront Guard Association and respectfully requests that it be denied.

STATUTES INVOLVED

In addition to the statutory provisions cited in the Petition, the following provisions of the Labor Manage-

ment Relations Act of 1947, set out verbatim in Appendix A, are relevant hereto: Section 8(b)(1)(A), (29 U.S.C. § 158(b)(1)(A)) and Section 8(b)(2), (29 U.S.C. § 158(b)(2)).

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case contains a number of factual inaccuracies which necessitate a response. Rather than include a separate statement of the case, we have addressed below those inaccuracies in order to correct Petitioner's Statement of the Case.

Petitioner states that the Collective Bargaining Agreement between it and the Steamship Trade Association was negotiated on Amstar's behalf. This point was never conceded by Amstar and, indeed, evidence was introduced into the record before the Administrative Law Judge in the unfair labor practice proceeding to support Amstar's contention that it never agreed to be bound by this Labor Agreement. The Administrative Law Judge found that:

> 3. Amstar, although a member of the Association, has at no time material herein delegated any authority to the Association to represent it in negotiations with the Respondent with respect to the wages, hours and conditions of employment of employees employed by Pinkerton to perform guard services at the Respondent's facility in Baltimore. (App. B at 15a-16a, Conclusion of Law 3).

Petitioner, in the first paragraph of its Statement of the Case, mistakenly asserts that the Arbitrator held Amstar did not have the right to contract for guard services with an independent contractor. This was not his holding. On the contrary, the Arbitrator merely held that the guards in question performed work within the jurisdictional language of the above mentioned Labor

Agreement, and therefore were required by its union security provision to become members of Petitioner. A clear understanding of the arbitration decision is important since the NLRB and its Administrative Law Judge held Petitioner's attempt to cause Amstar to comply with this Award of the Arbitrator constituted a violation of Section 8(b)(1)(A) and 8(b)(2) of the Act. (App. B at 16a, Conclusion of Law 5).

In the second paragraph of its Statement of the Case, Petitioner incorrectly characterizes the decision of the District Court in denying Amstar's Motion to Dismiss or for Summary Judgment, as "generally [upholding] the validity of the Arbitration Award." (Pet. at 3). The District Court was primarily concerned with the legal issues pertaining to Amstar's contention that compliance with the Arbitrator's Award would result in the commission of an unfair labor practice. After considering Amstar's arguments and various decisions of the National Labor Relations Board interpreting the National Labor Relations Act, the Court initially concluded that "[e]nforcement of the award would not necessarily result in an unfair labor practice" (363 F.Supp. at 1034). Although the Court denied Amstar's Motion to Dismiss or for Summary Judgment, it subsequently entered a stay, after the Administrative Law Judge's decision and while the unfair labor practice case was on appeal to the Labor Board and subsequently to the Fourth Circuit. A second stay order of the District Court is presently in effect (Respondent's Appendix B). Thus, contrary to Petitioner's assertion, the District Court did not uphold the Arbitration Award, but rather stayed the proceedings before it pending final judicial review of this decision.

REASONS FOR DENYING THE WRIT

Rule 19 of this Court's Rules sets forth general considerations or grounds governing decisions whether to

grant petitions for *certiorari.* It is not entirely clear which of those grounds Petitioner relies upon in seeking *certiorari.* However, the thrust of the Petitioner's argument is that the Fourth Circuit's affirmance of the NLRB's refusal to defer to the Award of the Arbitrator is in conflict with the decisions of this Court in the *Steelworker's Trilogy.*[1]

In addition Petitioner urges that the issuance of *per curiam* decision by the Fourth Circuit shows a lack of "serious consideration" of the issues by the Court. This contention is not worthy of a protracted response. Utilization of a *per curiam* decision by the Court reflects, in all probability, its recognition of the general judicial acceptance of the Labor Board's *Spielberg* doctrine,[2] as well as the fact it had previously decided that arbitration awards repugnant to the policies of the Act must be disregarded. *Glendale Mfg. Co.* v. *Local 520, ILGWU,* 283 F.2d 936 (CA 4 1960) *cert. denied,* 366 U.S. 950 (1961).

The *Steelworker's Trilogy* And *Gateway Coal* Cited By Petitioner Have No Bearing On The Relationship Of The National Labor Relations Board To Arbitration.

This Court in the *Steelworker's Trilogy* dealt with the relationship between the jurisdiction of arbitrators and federal courts. In them it held that national labor policy favors labor arbitration and the courts should

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[1] *United Steelworkers of America* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

[2] In *Spielberg Manufacturing Co.,* 112 NLRB 1080 (1955), the Board enunciated certain tests that must be met before it will recognize the validity of an arbitration award. These are: (a) the proceedings must have been fair and regular; (b) all parties must have agreed to be bound; and (c) the decision of the arbitrator must not be clearly repugnant to the Act.

defer to an arbitration award, so long as ". . . it draws its essence from the collective bargaining agreement." *Enterprise Wheel, supra* at 597. Neither the *Steelworker's Trilogy*, nor *Gateway Coal* (*Gateway Coal Company* v. *United Mineworkers of America*, 414 U.S. 368 (1974)) relied on by Petitioner addressed the relationship between the NLRB's jurisdiction and that of arbitrators.

Moreover, this Court in *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967) noted that the *Steelworker's Trilogy* ". . . dealt with the relationship of courts to arbitrators . . ." and that "[t]he relationship of the Board to the arbitration process is of a quite different order." Id. at 436. The Court concluded that:

> . . . to view the Steelworkers decisions as automatically requiring the Board in this case to defer to the primary determination of an arbitrator is to overlook important distinctions between those cases and this one. (Id. at 437).

Thus, the Court has already rejected Petitioner's argument that the *Trilogy* requires the Board to defer to arbitration.

The Board Has Plenary Authority To Decide Unfair Labor Practice Cases And Complete Discretion Regarding Deferral To Arbitration.

Petitioner's argument implies that the National Labor Relations Board has no jurisdiction to reconsider in an unfair labor practice case, a matter which has been the subject of a prior arbitration decision. In other words, Petitioner appears to argue that the *Steelworker's Trilogy* is inconsistent with the NLRB's *Spielberg* doctrine. A review of the post *Trilogy* cases dealing with the Board's jurisdiction, *vis a vis* arbitration, reveals just the opposite, namely, that the Board has full authority to decide whether particular acts constitute an

unfair labor practice, even though such acts may also be claimed to constitute a violation of a collective bargaining agreement. In other words, the Board is not *required* in such circumstances to defer to arbitration, nor is it bound to accept in all instances an arbitrator's determination. In *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964), this Court expressly approved the Board's *Spielberg* doctrine and recognized that under that doctrine the Board's jurisdiction is superior to that of an arbitrator. There the Court said: "[s]hould the Board disagree with the arbiter . . . the Board's ruling would, of course, take precedence. . . ." 375 U.S. at 272. In *Carey*, the Court cited with approval the following language taken from the Board's decision in *International Harvester Co.*, 138 NLRB 923, 927 (1962) in which the *Spielberg* doctrine was extended to representation cases:

> There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. (375 U.S. at 271).[3]

In *N.L.R.B.* v. *Plasterers' Local 79*, 404 U.S. 116 (1971), another post *Trilogy* case, this Court again expressed the view that the Board is not required to honor arbitration awards in all circumstances:

---

[3] In *International Harvester*, the Board further enunciated the rationale of *Spielberg*:

> If complete effectuation of the Federal policy is to be achieved, . . . the Board . . . should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act. (138 NLRB at 927).

> Although the Board is not statutorily required to honor arbitration awards in such situations, it often defers to them if the arbitrator has considered the alleged unfair labor practice. [citing *Spielberg* and *International Harvester*] (Id. at 137).

Only last year in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) the Court, speaking through Justice Powell, discussed the relationship of the NLRB and arbitration as follows:

> [T]he Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge . . . under the Act. Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964). Cf. Smith v. Evening News Assn., 371 U.S. 195 (1962). There . . . the relationship between the forums [arbitration and the NLRB] is complementary since consideration of the claim by both forums may promote the policies underlying each. (415 U.S. at 50-51).

Thus, Justice Powell expressly recognized that the Federal labor policy favoring arbitration and the NLRB's *Spielberg* doctrine are complementary. Hence the Court has *expressly* rejected Petitioner's position that the two policies are inconsistent.

Contrary To Petitioner's Claim, The *Spielberg* Standards Were Properly Applied And The Fourth Circuit Was Justified In Enforcing The Board's Order.

Inconsistent with its argument that the *Steelworker's Trilogy* vitiates the *Spielberg* doctrine and deprives the Board of any discretion with respect to deferral to arbitration, Petitioner also contends that the *Spielberg* standards were misapplied. It is argued that the Administrative Law Judge, the Board and, consequently,

the Fourth Circuit erred, first, in finding that Amstar was not bound by the labor agreement with respect to representation of the Pinkerton guards and, second, that the Award was repugnant to the policies of the Act. With respect to the first point, the Administrative Law Judge based his conclusion that Amstar was not bound by the agreement with respect to representation of the Pinkerton guards on evidence showing that Amstar had never delegated any authority to the Steamship Trade Association to negotiate on its behalf (App. B at 7a). He further relied on undisputed evidence that Pinkerton has never been a member of the multi-employer association and has never delegated any authority to that Association to negotiate on its behalf (App. B at 6a-7a). Finally he relied on uncontradicted evidence which showed that Amstar had never posted the $500 bond required of employer members of the Association whose employees were covered by the labor agreement with Petitioner (App. B at 13a n.2).

With respect to the second point, namely Petitioner's contention that the Award is not repugnant to the policies of the Act, we would simply point out that this Court has long held that entering into a contract with a minority union is a violation of Section 8(b)(1)(A) on the part of the Union. *Int'l. Ladies Garment Workers Union* v. *N.L.R.B.*, 366 U.S. 731 (1961). A representative of Petitioner admitted at the hearing that the Union *never* claimed to represent any of the Pinkerton guards (App. B at 9a-10a). For all of these reasons, Petitioner's contention that the *Spielberg* criteria were misapplied in this case is without merit. On the contrary, the foregoing evidence described in the Administrative Law Judge's decision constitutes substantial evidence on the record as a whole supporting the Board's decision and justifying enforcement by the Fourth Circuit.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

AMSTAR CORPORATION

By _____
MATTHEW E. MURRAY

_____
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_____
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DATED: April 21, 1975

APPENDIX A

LABOR MANAGEMENT RELATIONS ACT OF 1947

* * * *

§ 158. Unfair Labor Practices

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. 73-133-N

LOCAL 1852 WATERFRONT GUARD ASSOCIATION OF THE PORT OF BALTIMORE, I.W.A., a labor organization,
Plaintiff

vs.

AMSTAR CORPORATION,
Defendant

ORDER

On March 28, 1973, the Court received argument in support of Plaintiff's Motion for Judgment and Defendant's Motion for Reconsideration of the Court's denial of its Motion for Summary Judgment, set out in the Court's Memorandum Opinion dated September 14, 1973. Subsequent to the issuance of that opinion, the National Labor Relations Board in Waterfront Guard Association Local 1852, Case No. 5-CB-1323, 209 N.L.R.B. No. 87, a related case involving these parties, ruled Plaintiff's attempts to extend the labor contract in question to security guards employed by Pinkerton's Inc. at Plaintiff's Baltimore Refinery, constituted unfair labor practices within the meaning of Section 8(b)(2) and 8(b)(1)(A) of the Labor Management Relations Act, 29 U.S.C. § 141, *et seq.*

The Court being fully informed of these premises as well as advised by counsel of Plaintiff's intention to appeal the aforesaid National Labor Relations Board's decision to the United States Court of Appeals for the Fourth Circuit, believes that conservation of judicial

resources will best be served by staying all further proceedings in this cause, pending final judicial review of the related NLRB decision.

THEREFORE, it is so ordered this 15th day of April, 1974.

/s/ Edward S. Northrop
Edward S. Northrop
Chief United States District Judge

Filed 15th of April, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1195

WATERFRONT GUARD ASSOCIATION, LOCAL 1852, INDEPENDENT WATCHMEN'S ASSOCIATION OF THE PORT OF BALTIMORE, MARYLAND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. Petitioner (the "Guard Union") represents waterfront guards employed in the port of Baltimore, Maryland. The Guard Union was formed after enactment of the 1947 amendments to the National Labor Relations Act,[1] to provide separate representation for guard employees previously represented by the International Longshoremen's Association ("ILA") (Pet. 4-5). Both the Guard Union and ILA have collective bargaining agreements with the Steamship Trade Association of Baltimore,

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[1]Section 9(b)(3) of the Act, 29 U.S.C. 159, which was added in 1947, provides that the Board shall not determine that any unit is appropriate for collective bargaining "if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

Maryland ("the Association"), which acts as a multi-employer bargaining agent for its employer members (Pet. App. 4a; A. 12, 82, 268, 283).[2]

Amstar Corporation maintains a sugar refinery in Baltimore, Maryland (Pet. App. 4a; A. 243, 246). Most of its employees there are production and maintenance workers represented by the Amalgamated Meat Cutters and Butcher Workmen of North America (Pet. App. 4a-5a; A. 118). Amstar also employs some twenty longshoremen supplied by the ILA hiring hall to unload vessels carrying bulk sugar to its refinery (Pet. App. 7a; A. 82, 118). The longshoremen are covered by the Association's collective bargaining agreement with ILA (Pet. App. 5a, 7a; A. 82). Amstar joined the Association in 1937 (Pet. App. 7a; A. 81), before the Guard Union was formed (A. 193).

Since 1960, Amstar has contracted out the guard work at the refinery to Pinkerton, Inc. (Pet. App. 5a; A. 58-61, 116-117, 249-255), which employs about twelve guards there—eight or nine full time, and three or four part-time (Pet. App. 5a, 7a; A. 65). Pinkerton is the sole employer of the guards; it alone sets their wages and other terms and conditions of employment (A. 73-74). The Pinkerton guards have not chosen the Guard Union or any other labor organization to represent them, and the Guard Union has never claimed to have their majority support or asked Pinkerton to sign a collective bargaining agreement covering them (Pet. App. 6a-7a, 9a-10a; A. 63-64, 87-88, 122-123, 127-128).

---

[2] "Pet. App." refers to the appendix to the petition. "A." refers to the appendix to the briefs in the court of appeals.

In February 1972, following the election of new officers, the Guard Union sought for the first time to apply to Amstar its contract with the Association (Pet. App. 7a; A. 123-124, 200, 293-294). The Guard Union filed a grievance with the Association alleging that Amstar was violating the union security clause of the contract by employing guards who were not union members (Pet. App. 7a-8a; A. 88-89, 259).[3] Thereafter, the Guard Union required Amstar to arbitrate the question whether the contract applied to the guard employees (Pet. App. 8a, 18a-32a). The arbitrator upheld the Guard Union's grievance and ruled that all guards employed at Amstar's Baltimore refinery "must become and remain members" of the Guard Union (Pet. App. 8a, 33a). The Guard Union requested Amstar to comply with the award, adding that Amstar could keep the guards it had if it required them to join the Guard Union (Pet. App. 9a; A. 97, 107-108, 110, 137-138).

Amstar filed with the Board unfair labor practice charges against the Guard Union, and the latter, in turn, sued to enforce the award. On September 14, 1973, the district court denied Amstar's motion to dismiss or for summary judgment in the Guard Union's suit. *Local 1852, Waterfront Guard Ass'n* v. *Amstar Corp.*, 363 F. Supp. 1026 (D. Md.). Since the Board had not yet issued a decision on the unfair labor practice charges, the court found that enforcement of the arbitration award would not necessarily conflict with the result that the Board might ultimately reach. *Id.* at 1034. Following issuance of the Board's decision and order described below, the district court stayed further court action pending final judicial review of the Board's order (Amstar Br. in Opp. App. 2a-3a).

---

[3]The union security clause required covered employees to become members of the Guard Union on or after the 30th day of their employment or the effective date of the contract, whichever was later (A. 269).

2. On March 8, 1974, the Board found that the Guard Union had violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A), (2), by demanding that Amstar recognize the Union as the bargaining representative of the guards employed by Pinkerton when they had never authorized the Guard Union to represent them, and by seeking to require that, as a condition of their employment, the guards become union members under the union security clause of the Association's agreement with the Union (Pet. App. 10a-11a, 15a-16a). The Board ordered the Guard Union to cease and desist from demanding that Pinkerton, Amstar, or the Association enter into a collective bargaining agreement covering Pinkerton's guard employees at the Amstar refinery, unless the guards select the Union as their collective bargaining representative in a Board-conducted election or by some other valid means (Pet. App. 16a). The court of appeals enforced the Board's order (Pet. App. 1a), holding that there was substantial evidence to support the Board's findings, and that the Board was not required to defer to the award of the arbitrator.

3. Contrary to petitioner's contention (Pet. 6-10), there is no conflict between the Board's decision here and such cases as *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, and *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377-380, which accord great deference to the arbitral process in suits under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to enforce labor contracts. Those decisions did not affect the Board's exclusive authority to adjudicate and remedy unfair labor practices under Section 10(a) of the National Labor Relations Act, 29 U.S.C. 160. See *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, 435-437. Although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so (*National Labor Relations Board* v. *Strong*, 393 U.S. 357, 360-362), and if it elects to assert jurisdiction, its decision takes precedence over conflicting arbitral awards enforcing private contract rights (*Carey* v. *Westinghouse Elec. Corp.*, 375 U.S. 261, 272).

The Board reasonably exercised its discretion in declining to defer to the arbitrator's award in this case (Pet. App. 12a-13a). Since the Board is responsible for choosing an appropriate unit that will assure employees the fullest freedom of choice in selecting a statutory bargaining representative (Section 9(b) of the Act, 29 U.S.C. 159(b)), it may properly decide not to defer to arbitral awards that purport to determine whether the scope of the employee unit has been expanded through accretion under the contract. See *Combustion Eng'g, Inc.*, 195 NLRB 909, 911; *Hershey Foods Corp.*, 208 NLRB No. 70, enforced *sub nom. National Labor Relations Board* v. *Bakery & Confectionery Workers Int'l Union*, 506 F. 2d 1052 (C.A. 3). See also *Boire* v. *International Bhd. of Teamsters*, 479 F. 2d 778, 794-797 (C.A. 5). Cf. *Collyer Insulated Wire*, 192 NLRB 837.

Recognizing that the Board is not obliged to defer to the arbitrator's award, petitioner argues that the Board erred in determining that the award was not repugnant to the Act and thus misapplied its settled principles governing whether to defer to such an award (Pet. 8-10). See *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082. This case, however, offers no occasion for review of the Board's determination of repugnancy—which we think correct[4]—because the Board's general policy, as we have noted, is not to defer to arbitral determinations of unit issues.

---

[4]The Board properly determined (Pet. App. 14a) that the arbitrator's award here was repugnant to the Act because its effect was to impose representation by the Guard Union on the Pinkerton employees, as a matter of contract, and to deprive them of their statutory right to make their own choice of bargaining representative. See *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 325-326; *Emporium Capwell Co.* v. *Western Addition Community Organization*, Nos. 73-696 and 73-830, February 18, 1975, slip op. 13, n. 14; *Sheraton-Kauai Corp.* v. *National Labor Relation Board*, 429 F. 2d 1352, 1357 (C.A. 9); *Local 1547, Int'l Bhd. of*

The Board also found other established requirements for deferral unsatisfied in that (1) Pinkerton, although a necessary party, was not given notice of or an opportunity to participate in the arbitration proceedings, and (2) the arbitrator never considered the questions whether Amstar had ever manifested an unequivocal intent to be bound by the Association's multi-employer agreement with the Guard Union or whether Amstar and Pinkerton could be considered joint employers under the Act (Pet. App. 14a). Petitioner does not challenge those findings.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MAY 1975.

Elec. Workers v. *Local 959, Teamsters*, 507 F. 2d 872, 877-878 (C.A. 9). "The parties cannot by contractual agreement divest the Board's function to operate in the public interest, and this is so regardless of whether the contractual agreement is reached by consent or through an arbitrator's construction." *Boire* v. *International Bhd. of Teamsters*, *supra*, 479 F. 2d at 803. In short, the Guard Union's effort to force itself upon the nonconsenting Pinkerton guards, in violation of Section 8(b)(1)(A) and (2) of the Act, is not made lawful merely because the Union successfully invoked arbitration in support of its unlawful aim.